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Work of the Louisiana Supreme Court, 1937-38 Term: Criminal Law and Procedure

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*Sugar Co.*¹⁵ was a ruling that the evidence sustained the lower court's finding that the workman was a malingerer; and *Osborne v. McWilliams Dredging Co.*¹⁶ decided that supplemental pleading showed that the injury occurred in the scope of employment.

Finally, in *Rogers v. City of Hammond*¹⁷ it was held that a workman who wishes to dismiss a suit may do so regardless of the desire of his counsel to pursue an appeal. Apparently a lawyer has no vested interest in a workmen's compensation case.

V. CRIMINAL LAW AND PROCEDURE

Fifty criminal cases were decided during the judicial year 1937-1938—almost one-fifth of all the cases considered by the court. Of these, 33 were affirmed; in 17 the Supreme Court reversed, remanded, or otherwise set aside the decision of the district court.¹ These figures indicate that there is one chance in

15. 188 La. 498, 177 So. 586 (1938).

16. 189 La. 670, 180 So. 481 (1938).

17. 190 La. 1005, 183 So. 245 (1938).

1. The lower court rulings were set aside for the following reasons: failure properly to give notice of meeting to two jury commissioners, *State v. Milton*, 188 La. 423, 177 So. 260 (1937); a grand juror was disqualified because a felony charge initiated in 1905 was still on file, *State v. Gunter*, 188 La. 314, 177 So. 60 (1937); failure of indictment to allege an essential element, *State v. Gendusa*, 190 La. 422, 182 So. 559 (1938); finding that the accused, tried in a district court, was under 17 when the "offense" was committed, *State v. Connally*, 190 La. 175, 182 So. 318 (1938); invalidity of a liquor ordinance, *State v. Reed*, 188 La. 402, 177 So. 252 (1937), *State v. Leatherman*, 188 La. 411, 177 So. 255 (1937), *State v. Lawrence*, 188 La. 410, 177 So. 255 (1937), *State v. Weil*, 188 La. 430, 177 So. 369 (1937), *State v. Wactor*, 189 La. 535, 179 So. 865 (1938); unconstitutionality of a local statute prohibiting trapping, *State v. Tabor*, 189 La. 253, 179 So. 306 (1938); *State v. Clement*, 188 La. 923, 178 So. 493 (1938); jury's viewing scene of crime in absence of accused, *State v. Pepper*, 189 La. 795, 180 So. 640 (1938); transcript incomplete, *State v. Pepper*, 189 La. 802, 180 So. 642 (1938); for prescription, accused must be fugitive from Louisiana justice, not from that of another state, *State v. Berryhill*, 188 La. 550, 177 So. 663 (1937); habeas corpus dismissed because accused had waived defects in indictment, *State v. Chicola*, 188 La. 694, 177 So. 804 (1937); father's letter concerning custody of his child was not libelous, *State v. Lambert*, 188 La. 968, 178 So. 508 (1938); a juror, charged with perjury on his voir dire, should have been permitted to show that he voted for conviction, *State v. Serpas*, 188 La. 1074, 179 So. 1 (1938).

The above recital is hardly an adequate index of the variety of issues presented by the criminal jurisprudence of the past year. The most important problems will be discussed in the text in some detail. As a very general characterization, it may be stated that the decisions deal with questions of procedure, evidence, pleading, administration, interpretation of statutes, substantive law, and constitutionality. Most important in this last field is *State v. Pierre*, 189 La. 764, 180 So. 630 (1938), involving the question whether negroes were improperly excluded from the juries. The United States Supreme Court has granted certiorari in this case, 59 S.Ct. 100 (1938). The same issue was ineffectively raised in *State v. Walker*, 189 La. 241, 179 So. 302 (1938), and in *State v. Dierlamm*, 189 La. 544, 180 So. 135 (1938) where the accused was a white man.

three of having a district court judgment in a criminal case reversed on appeal. This seems high.² But it cannot be inferred that the trial courts are correspondingly incompetent. A reading of the cases suggests rather that the criminal law of Louisiana, especially that part of it dealing with pleading, procedure and evidence, is in an uncertain and at times a very confusing condition. In some instances it is also apparent that, although the problem arises as a procedural one, the root of the difficulty is in the substantive law.

One of the most important problems dealt with in the year's jurisprudence has to do with aggravated assaults and batteries. The issues are revealed in three cases.

In *State v. Antoine*³ the charge was "cutting with a dangerous weapon with intent to murder," and the defendant was convicted of "cutting with a dangerous weapon with intent to kill." Counsel for defendant had moved that the jury be instructed to return one of the following verdicts: "(1) Guilty as charged, or (2) guilty of cutting with a dangerous weapon with intent to kill, or (3) guilty of cutting with a dangerous weapon with intent to kill and wounding less than mayhem, or (4) guilty of assault with a dangerous weapon, or (5) guilty of assault and battery, or (6) not guilty."⁴ The court charged only (1), (2) and (6), and rejected the others on the ground that they were not responsive. This judgment was affirmed.

As to instruction (3) (less than mayhem), the court's opinion seeks support by reference to assertions in prior jurisprudence to the effect that a charge under section 794 of the Revised Statutes⁵ is not included in section 791.⁶ The most recent case thus referred to, *State v. Mitchell*,⁷ is a similar decision which in turn refers to *State v. Murdoch*⁸ and *State v. Jacques*.⁹ The *Murdoch* case would have been eminently worth studying for it reveals a sharp cleavage in decision, a remarkably well reasoned opinion by Mr. Jus-

2. However four of the reversals dealt with a Rapides ordinance which was declared invalid. *State v. Reed*, 188 La. 402, 177 So. 252 (1937), *State v. Lawrence*, 188 La. 410, 177 So. 255 (1937), *State v. Leatherman*, 188 La. 411, 177 So. 255 (1937), *State v. Weil*, 188 La. 430, 177 So. 369 (1937).

3. 189 La. 619, 180 So. 465 (1938).

4. 189 La. at 623, 180 So. at 466.

5. La. Rev. Stat. of 1870, § 794, as amended by La. Act 17 of 1888 [Dart's Crim. Stats. (1932) Art. 768].

6. La. Rev. Stat. of 1870, § 791, as amended by La. Act 43 of 1890 [Dart's Crim. Stats. (1932) Art. 764].

7. 153 La. 585, 96 So. 130 (1923).

8. 35 La. Ann. 729 (1883).

9. 45 La. Ann. 1451, 14 So. 213 (1893).

tice Manning, and the fact that *State v. Delaney*¹⁰ is a case presenting precisely the same facts as in the instant one (stabbing, etc.). There is an assertion in the majority opinion in the *Murdoch* case that "the nature of the wound, which is of the essence of the latter offense [mayhem], is not directly or indirectly put at issue"¹¹ (in the major charge). It may be possible to support this view by drawing a particularly fine distinction (between mayhem and other batteries) which would seem to have hardly any application in the trial of actual cases. Indeed it is a moot question whether such a distinction is theoretically maintainable since the location and nature of the wound would be relevant to proof of the criminal intent. The facts regarding the wound having been presented to the jury, only the court's instruction on the definition of mayhem would be required to support a verdict as to the latter. Without pressing this view unduly, it may be suggested that re-examination of the jurisprudence was possible.

As to instruction (4) (assault with a dangerous weapon), the court asserted that an indictment which denounces "cutting" does not include a charge of "assault." This assertion would find readier acceptance if the reverse of the instant case were involved (that is, if the charge had been for "assault," and the verdict for "cutting") for the aggravated cutting offenses are uniformly more serious than the aggravated assault offenses. By like token, it is difficult to follow the court's holding in this regard. The question at bottom is, broadly, the relationship of criminal battery to criminal assault; and the various statutes, confusing as they are in the aggregate, do apparently reveal this one principle of differentiation. Tort law rather clearly supports the view upheld in the instant case; but in the criminal law, there is abundant doctrine to require at least examination into the question whether battery does not necessarily include assault. As to instruction (5) (assault and battery), this is ignored in the opinion because counsel did not press it. Yet clearly it is involved in the principles discussed above.

Related problems are raised in *State v. Dent*¹² where the indictment charged that the defendant "did . . . assault with a dangerous weapon with intent to murder." Defendant's motion to quash, on the ground that no crime was charged, was granted; whereupon the State was permitted to substitute "strike," for "as-

10. 28 La. Ann. 434 (1876).

11. *State v. Murdoch*, 35 La. Ann. 729, 731 (1883).

12. 189 La. 159, 179 So. 67 (1938).

sault." On trial before another judge, the amended indictment was quashed, and the State appealed. This ruling was affirmed, the Supreme Court pointing out that sections 791 and 792 of the Revised Statutes¹³ not only charged distinct and separate crimes, but also that a verdict responsive to one of them could not be responsive to the other.¹⁴

It is clear from the above cases that there is considerable confusion in the substantive law of aggravated assaults. "Intent to kill" is differentiated from "intent to murder"; "striking" is differentiated from "assault" (which, of course, is necessary for certain purposes); and partially repealing legislation¹⁵ has increased the existing difficulties. Confusion in the substantive law leads to unfortunate consequences in procedural law; we have noted the courts' difficulties in determining the responsiveness of various verdicts. Yet in the problem here involved, the solution is relatively simple; or perhaps, one had better say the solution ought to be simple, for, under existing Louisiana law, a number of unusual difficulties need to be overcome.

As regards the various assaults, and the responsiveness of verdicts, two simple propositions apply: in the substantive law, "striking with intent to murder" is at one extreme, while simple "assault" is at the other. The substantive law should make clear the series of gradations between these two. As for responsiveness, the major includes the minor cognate offense. Such a term as "mayhem" can be interpreted to accord with these principles; better yet, it might be omitted from the substantive law and replaced by language that does not conjure up ancient connotations.

The burden of the writer's comments on *State v. Antoine*¹⁶ was *not* that the court's decision cannot be supported, but that there was sufficient vagueness and uncertainty in the jurisprudence to have permitted re-examination of the problem on its merits; and that the objectives which ought to be attained and the principles underlying the problem might well have suggested another conclusion. The courts, whether they will or not, do perform a legislative function as they extend the jurisprudence step by step.

13. La. Rev. Stats. of 1870, § 791, as amended by La. Act 43 of 1890, § 1 [Dart's Crim. Stats. (1932) Art. 764]; La. Rev. Stats. of 1870, § 792, as amended by La. Act 59 of 1896 and La. Act 9 of 1912 [Dart's Crim. Stats. (1932) Art. 766].

14. *State v. Broxton*, 188 La. 456, 177 So. 572 (1937), involved La. Rev. Stats. of 1870, § 793 [Dart's Crim. Stats. (1932) Art. 767].

15. See Annotations in Dart's Crim. Stats. (1932) Art. 767.

16. 189 La. 619, 180 So. 465 (1938), cited *supra* note 3.

There are other, perhaps more serious consequences that flow from the *Antoine* case because the rule now definitely established imposes rigid limitations on the responsiveness of verdicts for these lesser cognate offenses. In the *Antoine* case, a conviction was upheld, but does that mean that the State will be the future beneficiary of the ruling? By no means. For let us now consider, in the light of the Louisiana jurisprudence of criminal procedure, in just what position the district attorneys are placed.

We may assume that a desirable system of prosecution would permit one trial of a defendant or group of defendants for a single act or transaction. It would therefore permit the allegation of various charges in one indictment, each of which fitted all or part of the alleged criminal act or transaction. Finally, it would permit flexibility as to responsiveness; and in this, as in all particulars in the attainment of the above objectives, there is no need to sacrifice any of an accused person's rights. Criminal law should continue to guard these rights as zealously as ever, but this paramount issue should not be used to becloud the problem or to hamper the accomplishment of common efficiency through the elimination of unnecessary technicality that prevents attainment of proper goals.

These objectives were clearly in the minds of those who drafted the Code of Criminal Procedure. This is apparent from Article 218, interpreted in relation to prior jurisprudence, especially *State v. Hataway*¹⁷ which held that "the rule that two or more crimes, if committed in one transaction, may be charged in one indictment, is subject to the qualification that the two or more crimes so charged 'are subject to the same mode of trial and nature of punishment.'"¹⁸

Clearly Article 218 extended beyond that rule, for the mode of trial was not retained as a limitation on the joinder of offenses. The steps by which this article was declared to be unconstitutional,¹⁹ then partially reinstated²⁰ to re-introduce the rule of the *Hataway* case, were completely determined by Act 153 of 1932 which repealed Article 218. Interestingly enough, in two cases following this repeal²¹ the rule in the *Hataway* decision has apparently been revived. Because this latter course brings the juris-

17. 153 La. 751, 96 So. 556 (1923).

18. 153 La. at 755, 96 So. at 557.

19. *State v. Jacques*, 171 La. 994, 132 So. 657 (1931).

20. *State v. White*, 172 La. 1045, 136 So. 47 (1931).

21. *State v. Mansfield*, 178 La. 393, 151 So. 631 (1933); *State v. Turner*, 178 La. 927, 152 So. 567 (1934).

prudence squarely in conflict with Article 217, it is clear that the repeal of Article 218 was an incomplete job. The Code of Criminal Procedure needs clear amendment on the very important question of joinder of offenses. While this broader question cannot be discussed here, it is necessary to perceive the cumulative effect of the limitations on joinder of offenses brought about by the repeal of Article 218 and on responsiveness of verdict produced by the *Antoine* and similar cases.

What is the resulting position of the district attorney? The dependence of the mode of trial upon the gravity of the penalty, and the wide range of such sanctions, places serious limitations on the joinder of various assaults and batteries. If he charges either an aggravated battery or an aggravated assault, then he faces rigorous restrictions as to possible verdicts. He is placed in a position where his procedure is inefficient from its very inception, and where the best he can expect—saving luck—is a battle in the uncertain arena of double jeopardy. Yet the objectives that ought to be realized are everywhere recognized as proper and laudable. They have been pointed out above; and while the problem in its totality is one of considerable complexity, there is every reason to believe that most of the difficulties can be removed.

Among other cases decided during the past judicial year involving, incidentally, questions of substantive law, the most important is *State v. Gendusa*.²² Defendant was charged with burglary under section 850 of the Revised Statutes, a capital offense.²³ The indictment omitted the allegation of a "breaking." The defendant's motion to quash was overruled, as were his motions in arrest and for new trial. He was convicted and sentenced to death. On appeal, this conviction was reversed and the case remanded, with Mr. Justice Higgins strongly dissenting. His opinion discloses a degree of ambiguity in the substantive law, and it must be conceded that the criminal statute involved (§ 850) is poorly drawn. The legislature might profitably re-examine the various types of burglary not only with a view to improved expression but also as regards the policy concerning "breaking." If that element is retained for the maximum offense, it may still be questioned whether there should be such disparity in penalties as now exists between section 850 and the next most serious type of burglary.

22. 190 La. 422, 182 So. 559 (1938).

23. La. Rev. Stats. of 1870, § 850, as amended by La. Act 21 of 1926, § 1 [Dart's Crim. Stats. (1932) Art. 818].

For the purpose immediately in hand, the position of the court as regards verdicts on substantially defective indictments is of major interest. In effect the court holds that Article 557 (which provides broadly that no conviction shall be set aside for error unless there is a miscarriage of justice) must be read in connection with, and is, indeed, superseded in part by Article 418 (which provides that the omission of any essential averment from an indictment "constitutes an incurable defect"). In a lengthy review of the jurisprudence, upon rehearing, the court maintained its original view that the allegation of a "breaking" was essential, and that its omission was not cured by the verdict.

In its opinion²⁴ the court did not consider Article 253,²⁵ with the result that the application of that very important provision remains obscure and in part nullified. In its survey of cases, the court does not distinguish those in which objection to the indictment was timely from those where the defense omitted to demur or move to quash. Yet it is clear from Articles 284 and 253 that this is a matter of first importance. On that basis, it is possible to classify the *Gendusa* case with *State v. Pinsonat*,²⁶ *State v. Mor-*

24. In the *Gendusa* case, a motion to quash was made; hence Art. 253 was not applicable. But the opinion goes far beyond the facts, and may well be the most important decision on the general problem of incurability of an essentially defective indictment. See Art. 253, La. Code of Crim. Proc. of 1928, in note 25, *infra*.

25. Art. 253, La. Code of Crim. Proc. of 1928: "No indictment shall be quashed, set aside or dismissed or motion to quash be sustained or any motion for delay of sentence for the purpose of review be granted, nor shall any conviction be set aside or reversed on account of any defect in form or substance of the indictment, unless the objection to such indictment, specifically stating the defect claimed, be made prior to the commencement of the trial or at such time thereafter as the court in its discretion permit. The court may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence. If any amendment be made to the substance of the indictment or to cure a variance between the indictment and the proof, the accused shall on his motion be entitled to a discharge of the jury, if a jury has been empanelled and to a reasonable continuance of the cause unless it shall clearly appear from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made or that his rights will be fully protected by the proceedings with the trial or by a postponement thereof to a later day with the same or another jury. In case a jury shall be discharged from further consideration of a case under this section, the accused shall not be deemed to have been in jeopardy. No action of the court in refusing a continuance or postponement under this article shall be reviewable except after motion to and refusal by the trial court to grant a new trial therefor and no appeal based upon such action of the court shall be sustained, nor reversal had, unless from consideration of the whole proceedings, the reviewing court shall find that the accused was prejudiced in his defense or that a failure of justice resulted."

26. 188 La. 334, 177 So. 67 (1937).

ris,²⁷ and *State v. Gunter*²⁸ as properly decided because in each of these cases Articles 284 and 253 were observed.²⁹

This leaves for special consideration *State v. Williams*³⁰ and *State v. McDonald*.³¹ In the former case, the defendant was charged with operating a "gambling" game. At the conclusion of the evidence, the State was permitted to amend the information by substituting "banking" for "gambling," thus bringing the charge within a penal statute. The trial court submitted that the defendant had not been injured because evidence of "banking" had been introduced, that defendant did not move for a continuance, and that Article 253 required the amendment as made. The Supreme Court reversed the decision. Article 253 was not analyzed, and because the trial was upon an information which did not allege an offense, it was held that "therefore it was prejudicial error to convict him of the offense charged in the amended information, without a hearing thereon."³² Presumably, in this case, the only manner of prejudice could be by way of surprise. Yet evidence of "banking" was introduced, and was contested by the defendant, who did not request any continuance. It does not seem unwarranted to conclude that the decision assumed what was to be proved (that there *was* prejudicial error) and that it did not carefully consider Article 253 in the light of its clear objectives.

The *Williams* conviction was for a misdemeanor. Of major importance is the *McDonald* case where the charge was burglary, and the sentence was to hard labor. The indictment charged that defendant broke and entered "The American Hat Company." Defendant's motion to arrest judgment on the ground that no shop, store, other building, and so on, had been alleged, was overruled. The conviction was set aside on the ground that the information was fatally defective, that is, it could not be cured by the verdict. The court relied on the *Williams* case, discussed above,

27. 185 La. 1037, 171 So. 437 (1936).

28. 188 La. 314, 177 So. 60 (1937).

29. These cases suggest that district attorneys might lean more definitely in the direction of acceding to the motion to quash where at least a clear doubt has been raised (as in the *Gendusa* case), for by such an attitude held by them and the trial judges who must take such a view, costly errors as have occurred might be avoided.

30. 173 La. 1, 136 So. 68 (1931).

31. 178 La. 612, 152 So. 308 (1934). The third case relied upon was *State v. Jackson*, 43 La. Ann. 183, 8 So. 440 (1891); it will be argued in the text that the Code of Criminal Procedure sought to prevent the very situation here presented.

32. *State v. Williams*, 173 La. 1, 8, 136 So. 68, 70 (1931).

and on the *Jackson*³³ case decided in 1891, where no motion to quash had been made. Obviously, if the Code changed the prior jurisprudence, the *Jackson* case cannot be invoked; the *Williams* case, as pointed out, did not analyze the points at issue. Hence the *McDonald* case is the only one of weight on the position taken, and this has unfortunately been re-enforced by dicta in the *Gen-dusa* case.

Article 284 was stressed in the *McDonald* case. The language of that article seems plainly to have enlarged the prior statute, for it provides that "every objection . . ." whereas section 1064 of the Revised Statutes provided that "every objection . . . for any formal defect . . . shall be taken by demurrer . . ." In spite of this clear language, the court in the *McDonald* case restricted Article 284 to formal defects. In the first place, the court supports its view to some extent by a rather strained interpretation of the wording of this article (whereas an eye to the purpose of Article 284 might well have led to the opposite view). Secondly, the court restricted Article 284 to formal defects because

" . . . if it had been intended by the adoption of the Code to deprive an accused person of the right to quash the proceedings by motion in arrest of judgment, because of his failure to demur or to file a motion to quash in limine, there would not have been put into the Code those articles under title 26, which relate to 'The motion in arrest of judgment.' "

"If it had been intended to cut an accused party off from availing himself of the benefits of the motion in arrest merely because he failed to demur or object to the indictment in limine where the indictment is substantially defective, the inclusion in the Code of those provisions relating to motions in arrest was a vain and useless formality, tending only to confuse."³⁴

Is that conclusion sound? One can determine the purpose of Article 284 only in the light of the prior jurisprudence and of the differences in the statutes prevailing at the respective times. The evil of the prior jurisprudence was the product of a long development in the common law. It permitted a defendant to stand by, observe a substantially defective declaration or indictment, and then by motion after verdict, upset the entire proceedings. In recent years, most states have sought to avoid that evil by insisting

33. *State v. Jackson*, 43 La. Ann. 183, 8 So. 440 (1891).

34. *State v. McDonald*, 178 La. 612, 622-623, 623-624, 152 So. 308, 311 (1934).

that objection to pleadings be made at the outset. The evil sought to be avoided is clear; the purpose of such provisions as Article 284 is correspondingly clear.

The surprising fact about the *McDonald* case is that Article 253 *was not even mentioned*. It is difficult to understand such omission because Article 284 simply states the rule categorically; Article 253 elaborates the consequences in detail. Article 253 confers the broadest powers of amendment; it provides for continuance where the defendant has been surprised; for a new jury, if necessary; and it states specifically: "... nor shall any conviction be set aside or reversed on account of any defect in form or substance of the indictment, unless the objection . . . be made prior to the commencement of the trial . . ."

Returning to the court's assertion in the *McDonald* case that Article 284 must be confined to formal defects, or be a "useless formality," we see the alternative hypothesis, namely, that Articles 284 and 253 require *all* objections to indictments to be urged prior to trial; that *if the objection is taken in such timely fashion*, then the defendant may again raise objections to *substantial* defects by motion in arrest. There is nothing whatever in Articles 517 and 518 which makes it impossible to apply the above limitation upon their operation, that is, that a demurrer or motion to quash must have preceded. It is true that the Code does not expressly assert that, but it is equally true that it does not expressly assert the opposite. The advantages of pursuing the first interpretation are numerous and apparent. How else give effect to the specific language in Articles 284 and 253 which so clearly extend beyond the older statute and jurisprudence? The interpretation here recommended does give them effect. It also gives effect to Articles 517 and 518.³⁵

The obvious conclusion is that it was sought on the one hand to avoid the evil of sharp procedure because of defects in pleading, and on the other hand, to give the trial judge ample opportunity to correct mistakes of pleading. This latter is done by the Code, by provision for arresting judgment. Assuredly it is preferable to give limited application—but important application nonetheless—to Articles 517 and 518 than it is to ignore the plain language of Articles 284 and 253.

35. Art. 418, La. Code of Crim. Proc. of 1928 complicates the problem somewhat; and it would be helpful if the Code had related this article to the others discussed. As it stands, it can be interpreted to mean simply that a (proper) motion is required as regards substantial defects whereas formal ones that go unnoticed are cured by the verdict.

On the other hand, there is no doubt that serious questions remain to be settled. Just how far can the above principles be allowed to operate without unfairness? How defective can pleadings be permitted to be? Some limitations on Article 253 seem to be needed, and it is not possible to do more here than suggest the broad lines of issue. The problem is dismissed in the *Gendusa* case with a sweeping assertion that "to convict a person of a capital crime under an indictment from which an essential averment is omitted constitutes a substantial violation of a constitutional right."³⁶ In one possible and extreme interpretation, that proposition may be valid. But is it valid under the limitations prescribed by Article 253 where provision is made for continuance and discharge of the jury? And the rules as to admissibility of evidence provide an additional check. Consequently, it is difficult to see why the canons as to notice, time for preparation, and fair trial may not be preserved within the framework of a procedure which is designed to prevent taking undue advantage of technical defects. In the *McDonald* case, Justices Rogers and Brunot (who wrote the opinion in the *Williams* case) dissented. And in his concurring opinion in *State v. Wall*, Chief Justice O'Niell wrote:

"In such a case it would be a failure in the administering of justice to set free a defendant whose guilt has been proved in every essential element of the crime charged, after he has silently taken his chance of being forever acquitted of the crime charged. It was to prevent such a failure in the administering of justice that the provisions of article 253 of the Code of Criminal Procedure were adopted."³⁷

Accordingly, since all the discussion in the *Gendusa* opinion, insofar as it bears upon failure to demur or move to quash, is dicta, it is possible to re-examine the question with hope of revision.

Many questions of evidence arose in the cases, and among these, admissibility is perhaps the most commonly involved. And most important here was the question of admission of evidence of ill-repute of, or prior threats made by, the deceased in cases of self defense.

Article 482 of the Code of Criminal Procedure provides:

"In the absence of proof of hostile demonstration or of overt act on the part of the person slain or injured, evidence

36. *State v. Gendusa*, 190 La. 422, 446, 182 So. 559, 567 (1938).

37. *State v. Wall*, 189 La. 653, 669, 180 So. 476, 481 (1938).

of his dangerous character or of his threats against accused is not admissible."

Two cases discuss the issues in detail. In *State v. Thornhill*³⁸ the defendant, a police officer, testified that the deceased advanced upon him despite his order to stop, that he "threw his hands in his pockets," at which time the defendant shot him once, that he then "came out with his gun," and so forth. All of this was denied by bystanders. The court found that the defendant was thoroughly impeached as to his testimony that the deceased drew a pistol. Hence, evidence of an altercation thirty minutes before the shooting and of ill-repute was not admitted. This decision was upheld by the Supreme Court with Chief Justice O'Niell writing a distinguished dissenting opinion.

The position of the Chief Justice is that

"... a person on trial for murder or manslaughter, who pleads that he did the killing in self-defense, should be allowed to introduce evidence of previous threats on the part of the deceased, or of the dangerous character of the deceased, whenever there has been introduced any evidence at all from which the jury might decide that the deceased made a hostile demonstration against the defendant at the moment of the killing."³⁹

His reason is that once *some* evidence is introduced, a question of fact arises which goes to the issue (was the accused the aggressor?) and that it should accordingly go to the jury along with evidence of prior threats or ill-repute of the deceased, since the latter bear upon the question at issue. The learned Justice argues that the majority ruling requires the defendant to prove that the deceased was the aggressor without giving him the benefit of the total relevant situation. But Article 482 requires *proof* of an overt act before *evidence* of prior threats is admissible. Chief Justice O'Niell accordingly argues that "proof" and "evidence" in that context are synonymous, but reliance upon Webster, the sole authority adduced, lends little weight to this argument. If Article 482 were so construed, it could be entirely nullified in its purpose to place some fair limitation upon the admissibility of evidence of prior threats, since the defendant could always testify. Hence, "proof" as used in Article 482 probably means evidence that carries some persuasion. But how much evidence, or what degree of persuasion required, is not stated. The opinion

38. 188 La. 762, 178 So. 343 (1938).

39. 188 La. at 794, 178 So. at 354.

stresses "reasonable ground," and the indications are that some doubt must be raised. In any event, the criticism of the Chief Justice would still be relevant, though not necessarily acceptable.

The same issues were raised in *State v. Stracner*⁴⁰ but under facts much more favorable to the accused, and hence to Chief Justice O'Niell's position. Here the defendant testified to various aggressive acts on the part of the deceased including actual battery, and a 13-year old boy testified that the deceased had a knife in his hand. All of this evidence was contradicted, and the court did not credit it. A further point of importance results from the court's holding that "an overt act is a hostile demonstration of such character as to create in the mind of a reasonable person the belief that he is in immediate danger of losing his life or of suffering great bodily harm."⁴¹ The additional difficulty which this raises results from use of the term "reasonable person." For it is left in doubt as to whether the facts that previous threats were made and that the deceased was a person of vicious character, will be considered by the judge in determining whether the defendant acted reasonably. If such threats are not to be considered for the purpose of determining reasonableness of the defendant's belief that the act was overt, a real hardship is imposed. Yet the usual qualifying words "in the situation of the defendant" are not employed. Certainly it would seem that so far as the trial judge is concerned, for the purpose of deciding whether the defendant reasonably believed an overt act was being made, prior threats should be heard. There is some indication to suggest that they were heard. If the trial judge does go into the entire fact-situation, including prior threats, and if on that basis he uses the standard of a reasonable person in the position of the defendant to determine whether an overt act was made, then some benefit is derived by the defendant as regards proof of dangerous aggression at the time of the homicide.

As for the major issue, it is apparent that it concerns a question of policy rather than one of law. Simply because the trial judge passes upon the question to determine admissibility, does not mean that he is not deciding a question of fact, even though those facts and his ruling are reviewable. But it is not uncommon for judges to exercise such a fact-finding function in jury cases. If one adheres to the prevailing view that juries should be protected from certain types of misleading or inflammatory evidence,

40. 190 La. 457, 182 So. 571 (1938).

41. 190 La. at 470, 182 So. at 575.

then the limitation suggested seems reasonable. But the opposite view is quite defensible, and it has been urged to the extent of arguing that no relevant evidence whatever should be kept from the jury. No more is here suggested than that (1) the underlying problem is one of policy and (2) that the existing law (both code and jurisprudence) might well be clarified as to (a) the definition of overt act and (b) the nature of evidence or degree of persuasion required on the part of the trial judge.

An important problem in the administration of any code of procedure concerns the determination of which provisions must be strictly followed, which may be departed from—and to what extent. Three cases in last year's decisions reveal the nature of the difficulties encountered. In *State v. Milton*⁴² the defendant was convicted of murder and sentenced to be hanged. He had moved unsuccessfully to quash the entire jury array on the ground that only three members of the jury commission (together with the clerk) had officiated. Notice had been sent the other two commissioners on the day of the meeting, and there was doubt whether it had been received. Article 176 of the Code states that three members and the clerk constitute a quorum provided all the members shall have been notified. The verdict was set aside with no consideration given to Article 557.⁴³

In *State v. Thornhill*,⁴⁴ after the entire jury had been selected and sworn, the prosecution was permitted to challenge a juror peremptorily—despite Article 358. The court quoted Article 557 and found that no injury had been done to the defendant.

In *State v. Butler*⁴⁵ the defendant was charged with assault by wilful shooting, tried by a jury of five, and convicted as charged. After four jurors had been accepted and sworn, defendant's counsel noticed that the sheriff was calling the jurors from the list instead of drawing their names by lot from the box. The Supreme Court held that the names should have been drawn by lot and that "there is merit in the argument, that serious injustice

42. 188 La. 423, 177 So. 260 (1937).

43. Art. 557, La. Code of Crim. Proc. of 1928: "No judgment shall be set aside, or a new trial granted by any appellate court of this State, in any criminal case, on the grounds of misdirection of the jury or the improper admission or rejection of evidence, or as to error of any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, is prejudicial to the substantial rights of the accused, or constitutes a substantial violation of a constitutional or statutory right."

44. 188 La. 762, 178 So. 343 (1938), cited *supra* note 38.

45. 190 La. 383, 182 So. 546 (1938).

may result, either to the State or to a defendant, from the practice of permitting the sheriff to call the names of the jurors from the list . . ."⁴⁶ Yet it found that defendant had suffered no injury.⁴⁷

In *State v. Gunter*⁴⁸ the defendant was convicted of manslaughter. He had moved to quash the indictment on the ground that one of the grand jurors had a felony charge pending against him—disqualifying him under Article 172. This grand juror had been convicted of a felony in 1905. The conviction had been set aside and the case remanded. It had rested on the dead docket for thirty-three years until it was nolle prossed when defendant moved to quash the indictment. The grand juror had lived in Rapides parish all those years and had exercised all rights of citizenship. Article 8 of the Code of Criminal Procedure directs the district attorney to nolle prosequere a felony charge when six years have elapsed from the finding of the indictment. The Supreme Court held that the grand juror was disqualified, reversed the conviction and declared the indictment void.

It will be noted in the above cases that where the penalty is severe, there seems to be a tendency to apply Article 557 more readily than otherwise. Yet such commendable motivation does not result in a clearer understanding of this article. What is needed is an analysis of the different types of mandate in order to determine from the nature of the various situations, purposes and policies, which provisions must be strictly applied regardless of lack of proof of injury, and which ones may be departed from unless there is injury.

Finally, perhaps a few remarks may be permitted regarding the form of the opinions. Some of them would be a credit to the jurisprudence of any state. But many of the opinions suffer from lack of analysis of the various principles involved. There is a tendency to settle issues by reference to authority, when that authority itself was not the outcome of a reasoned discourse or where it rests upon quite different facts. And it seems to be the custom to discuss each and every point raised in the Bill of Exceptions regardless of its merit, with the result that the opinions are disjointed and, so far as future adjudication is concerned, much less helpful than they might be. Lawyers, of course, like to

46. 190 La. at 389, 182 So. at 548.

47. Another reason for affirming the judgment was that defendant accepted the first four jurors, though his challenges were not exhausted.

48. 188 La. 314, 177 So. 60 (1937).

have each point passed upon; but the court owes a duty not only in the case before it, but also as regards the construction of a sound jurisprudence. A very brief disposition of points of little or no merit would permit more detailed and carefully written analysis of the fundamental issues. Certainly it would seem that this would greatly improve the jurisprudence—which, so far as criminal law and procedure are concerned, is much to be desired.

VI. PUBLIC LAW

A. CONSTITUTIONAL LAW

Of the many statutes whose constitutionality was challenged in the Supreme Court during the last term, only one was invalidated. This was a relatively minor act that imposed certain restrictions upon trapping.¹ And the legislation here was set aside not because of any lack of power in the legislature but because the act, being a "local or special law," had not been preceded by proper publication.

Most of the major constitutional guaranties were under review; due process, equal protection of the laws, obligation of contracts, right to pursue a lawful calling, and many of the various safeguards available to the accused in a criminal prosecution. In addition, many specific provisions of the Louisiana Constitution were invoked. It is indeed noteworthy that in all these instances, save one, the large number of statutes under attack survived.

Price Fixing. Without doubt, the most important constitutional issue considered by the Supreme Court during the past term was raised in the case of *Board of Barber Examiners of Louisiana v. Parker*.² This decision established the right of the State to fix minimum prices for barbering services. Act 48 of 1936,³ after a long declaration of policy affirming the close connection between barbershop prices and the public health, proceeded in section 12 to charge the Board of Barber Examiners with the duty of approving and establishing minimum price agreements submitted by any organized groups of at least 75 per cent of the barbers of each Judicial District.

Before promulgating such agreements, the Board was di-

1. La. Act 130 of 1936 [Dart's Stats. (Supp. 1937) §§ 2974.1-2974.3], held unconstitutional in *State v. Clement*, 188 La. 923, 178 So. 493 (1938) and in *State v. Tabor*, 189 La. 253, 179 So. 306 (1938).

2. 190 La. 214, 182 So. 485 (1938), noted in (1938) 1 LOUISIANA LAW REVIEW 218, and in (1938) 13 Tulane L. Rev. 144.

3. Dart's Stats. (Supp. 1938) §§ 9389.1-9389.15.